Supreme Court, U. S.
FILED
DEC 4 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-886

WESLEY-JESSEN INC., AN ILLINOIS CORPORATION, AND DR. NEWTON K. WESLEY,

Petitioners,

vs.

MARCELLO CHIQUIAR ARIAS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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IN THE
SUPREME COURT OF THE
UNITED STATES
OCTOBER TERM, 1978

NO. _____

WESLEY-JESSEN INC.,
an Illinois corporation,
and DR. NEWTON K. WESLEY,

Petitioners,

v.

MARCELO CHIQUIAR ARIAS,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

INDEX

Table of Authorities..... i

Opinions Below 2

Jurisdiction 3

Question Presented 4

Statutory Authorities 5

Statement of the Case 6

Reasons for Granting Writ of Certiorari 29

Conclusion 36

APPENDIX:

Memorandum Opinion and Order of United States District Court, For the Northern District of Illinois A1

Opinion of the Court of Appeals, Seventh Circuit .. A7

Opinion of the Court of Appeals, Seventh Circuit, denying Petition for Rehearing A8

1 Ill. Rev. Stat. 1959, Ch. 10, Sec. 1, page 194. (Arbitration and Awards) .. A9

1 Ill. Rev. Stat. 1977, Ch. 10, Sec. 101, page 189. (Uniform Arbitration Act) A10

1 Ill. Rev. Stat. 1977, Ch. 10, Sec. 119, page 191. (Uniform Arbitration Act)..... A11

8 U.S.C. 1976 ed., Title 28, Sec. 1291, page 159. (Jurisdiction and Venue) A12

8 U.S.C. 1976 ed., Title 28, Sec. 1292 (a)(1), page 160. (Jurisdiction and Venue)... A13

TABLE OF AUTHORITIES

Cases.

American Safety Equipment v. J. P. McGuire Company Inc., 391 F. 2d 821 (2d Cir. 1968)...16, 17, 18, 24, 32, 33, 34

Baltimore Contractors Inc. v. Bodinger, 348 U.S. 176 (1955).....16, 22, 23, 27, 29, 30, 35

Cocalis v. Nazlides, 308 Ill. 152, 139 N.E. 95 (1923).....9, 10, 13

Cuneo Press v. Kokomo Paper Handler's Union, 235 F. 2d 108 (7th Cir. 1956) 21, 32

Danford v. Schwabacher, 488 F. 2d 454 (9th Cir. 1973)..24, 32

Enelow v. New York Life Insurance Company, 293 U.S. 397 (1934).....16, 21, 22, 29, 35

Ettleson v. Metropolitan Life Insurance Company, 317 U.S. 188 (1942).....16, 29, 35

Hudson Lumber Co. v. United States Plywood Corporation, 181 F. 2d 929 (9th Cir. 1950).....20, 32, 33

J.S. & H. Construction Company v. Richmond County Hospital Authority, 473 F. 2d 212 (5th Cir. 1973).....17, 24, 32

Power Replacement Inc. v. Air Preheater Company Inc., 426 F. 2d 980 (9th Cir. 1970).....16, 32

Shanferoke Co. v. Westchester, 293 U.S. 449 (1942).....16, 21, 22, 29, 35

Standard Chlorine of Delaware v. Leonard, 384 F. 2d 304 (2d Cir. 1967).....16, 32

Travel Consultants v. Travel Management Corporation, 367 F. 2d 334 (D.C. Cir. 1966).....16, 32

Wallace v. Norman Industries, 467 F. 2d 824 (5th Cir. 1972).....17, 32

Weissbuch v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 558 F. 2d 831 (7th Cir. 1977).....32

Zell v. Jacoby-Bender Inc. 542 F. 2d 34 (7th Cir. 1976).....17, 22, 27, 29, 32

Statutes

28	U.S.C. 1254(1)	3
110	Ill. Rev. Stat. §16	9
110	Ill. Rev. Stat. §17	9
10	Ill. Rev. Stat. §101 ...	9
10	Ill. Rev. Stat. §1-30 ..	10
10	Ill. Rev. Stat. §101-123	11
10	Ill. Rev. Stat. §119 ...	11, 13
28	U.S.C. 1292(a)(1)	15, 21, 22, 23, 26, 27, 28, 30
28	U.S.C. 1291	27

The Petitioners-Plaintiffs, WESLEY-JESSEN INC., an Illinois corporation, and DR. NEWTON K. WESLEY, respectfully pray that a Writ of Certiorari issue to review the Order and Opinion of the United States Court of Appeals for the Seventh Circuit in favor of the Respondent-Defendant herein, MARCELO CHIQUIAR ARIAS, whereby the appeal of the Petitioners from an Order staying the proceeding pending arbitration was dismissed. A Petition for Rehearing was denied.

OPINIONS BELOW

On March 15, 1978, an opinion was filed by the United States District Court for the Northern District of Illinois, Eastern Division, staying the proceedings pending arbitration pursuant to the motion of the respondent (App'x, page A1). On September 7, 1978, an opinion (dated September 6, 1978) was filed by the United States Court of Appeals for the Seventh Circuit whereby the appeal of the March 15, 1978 order was dismissed (App'x, page A7). On October 17, 1978, an opinion was filed by the United States Court of Appeals for the Seventh Circuit whereby the Petitioners' petition for rehearing was denied (App'x, page A8).

JURISDICTION

The Order of the United States Court of Appeals for the Seventh Circuit was entered on September 7, 1978 (App'x, page A7). A timely Petition for Rehearing was filed, then denied on October 17, 1978 (App'x, page A8).

This Petition for Certiorari is filed within 90 days. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

Can one Circuit of the United States Court of Appeals render a decision denying a litigant the right to appeal an order staying proceedings before the United States District Court pending arbitration where such decision is in direct conflict with the Enelow-Ettelson Rule established by the Supreme Court of the United States and decisions rendered by other circuits of the United States Courts of Appeal and the Supreme Court of the United States.

STATUTORY AUTHORITIES

1 Ill. Rev. Stat. 1959, ch. 10, §§1-30, pages 194 et seq.

1 Ill. Rev. Stat. 1977, ch. 10, §§101-123, pages 189 et seq.

1 Ill. Rev. Stat. 1977, ch. 10, §119, page 191.

3 Ill. Rev. Stat. 1975, ch. 110, §16, page 355.

3 Ill. Rev. Stat. 1975, ch. 110, §17, page 356.

8 U.S.C. 1976 ed., Title 28, §1254, page 157.

8 U.S.C. 1976 ed., Title 28, §1291, page 159.

8 U.S.C. 1976 ed., Title 28, §1292(a)(1), page 160.

7 U.S.C. 1970 ed., Title 28, §1332, page 7566.

STATEMENT OF THE CASE

The Petitioners-Plaintiffs, WESLEY-JESSEN INC., an Illinois corporation, and DR. NEWTON K. WESLEY (hereinafter referred to as PETITIONERS) filed a two count Complaint against the Respondent-Defendant, MARCELO CHIQUIAR ARIAS (hereinafter referred to as RESPONDENT), in the United States District Court for the Northern District of Illinois, Eastern Division. The suit was filed on the basis of diversity of citizenship. The Complaint seeks a declaratory judgment of the rights and obligations of the respective parties with regard to certain alleged disclosures by the Respondent to the Petitioners relating to the manufacture and use of contact lenses. Count I charges that a written agreement dated March 24, 1960 required the Respondent to make disclosures to the

Petitioners of any and all experience, information, knowledge, skill, and know-how which he may have or gain regarding the manufacture and use of contact lenses and related equipment, machinery, and supplies and this Count I further charges that the said Agreement also provided that such disclosures can be used "without charge". Count II charges that the alleged disclosures of the Respondent were useless, not novel, and never used. Count I and Count II request the court, inter-alia, to enter judgment declaring that the Respondent, despite his demands, has no right to any moneys or royalties in connection with the products produced and manufactured by the Petitioners. Therefore, the controversy requiring a declaratory judgment is that the Respondent has demanded royalties and moneys in connection with his alleged disclosures regard-

ing contact lenses, whereas, the Petitioners have asserted that the Respondent was under a duty pursuant to the written agreement dated March 24, 1960 to make such disclosures and that by the very terms of said written agreement the Petitioners could use such disclosures without charge. In addition, Petitioners have asserted in their Complaint in Count II that the Respondent is not entitled to any moneys or royalties because the alleged disclosures were useless, not novel, and never used. In essence, the dispute is as to what royalty or moneys, if any, Respondent is entitled to receive from the Petitioners.

After service of process upon the Respondent, he moved, by a Motion to Quash Service of Complaint, to dismiss this action for lack of personal jurisdiction. This issue was fully and exten-

sively briefed by the respective parties and on August 30, 1977 the Honorable Bernard M. Decker denied Respondent's Motion holding that jurisdiction over the Respondent was proper under the Illinois Long Arm Statute. 110 Ill. Rev. Stat., Sec. 16, 17.

Thereafter instead of filing an answer, Respondent filed a Motion to Stay Proceedings on November 29, 1977. Said Motion asserted that paragraph 12 of the Agreement dated March 24, 1960 required arbitration prior to litigation and that such provision was valid and enforceable under "Smith-Hurd Ill. Stat., Title 10, Sec. 101 (Ill. Laws 1971, p. 3844, Sec. 1, effective August 24, 1961)", and based upon Sec. 1 of the Uniform Arbitration Act and the case of Cocalis v. Nazlides, 308 Ill. 152, 139 N.E. 95 (1923).

The Petitioners filed their Memorandum in Opposition to Motion to Stay Proceedings on January 24, 1978. The Memorandum explained that paragraph 12 of the subject Agreement does not create an enforceable agreement to arbitrate the subject controversy since on March 24, 1960, the date of the subject Agreement, the Arbitration and Awards Statute, 10 Ill. Rev. Stat., Sec. 1-30 (effective date July 1, 1919) was in effect and was controlling of agreements regarding arbitration in the State of Illinois and this Statute and the Cocalis case, which is the leading case interpreting said Statute, provided that only agreements to arbitrate disputes antecedent to and/or existing as of the actual date of the Agreement to arbitrate were enforceable. Said Statute and case established that a provision in an agreement to arbitrate future contro-

versies was unenforceable. The Petitioners further asserted in said Memorandum that the Respondent is seeking arbitration of a dispute that arose after March 24, 1960, the date of the written agreement and that, therefore, the provision in the subject Agreement calling for arbitration is unenforceable. The Petitioners further asserted in that Memorandum that the Uniform Arbitration Act, 10 Ill. Rev. Stat., Sec. 101-123 became effective on August 24, 1961 and that this Act did authorize agreements to arbitrate future disputes. However, the Legislature of the State of Illinois expressly limited the application of the Uniform Arbitration Act to agreements made subsequent to August 24, 1961. 10 Ill. Rev. Stat., Sec. 119. In addition, the Petitioners asserted in their Memorandum that a condition precedent to arbitration established by para-

graph 12 of the subject Agreement was not satisfied since the dispute is capable of resolution under the terms of said Agreement and the Petitioners' Motion for Summary Judgment should be considered so as to bring the dispute to a conclusion.

The Respondent filed a reply to said Memorandum which distorted the applicable law and facts so as to facilitate an argument in support of the Respondent's Motion.

On March 15, 1978, Judge Decker entered a Memorandum Opinion and Order granting Respondent's Motion to Stay. Said Memorandum Opinion and Order stated the following in pertinent part:

> "The Plaintiffs' second argument against application of paragraph 12 is that the arbitration agreement is void because in 1960, the date of the contract, Illinois courts refused to order specific performance of such agreements, Cocalis v. Nazlides, 308 Ill. 152 (1923). How-

> ever, the relevant Illinois statute was amended in 1961 and present law clearly provides that arbitration clauses are enforceable...".

Judge Decker's decision disregarded the applicable law and is devoid of any statutory or case support. Judge Decker's decision is in direct conflict with the applicable statute and case authority. In particular, Judge Decker disregarded Sec. 119 of the Uniform Arbitration Act which made the Uniform Arbitration Act applicable only to agreements made subsequent to the Act's effective date, to-wit: August 24, 1961 and also disregarded the law of Illinois as it existed on March 24, 1960 with regard to arbitration agreements as expressed in the Arbitration Awards Statute, Cocalis, and numerous other cases whereby agreements to arbitrate future disputes were held unenforceable.

On March 21, 1978, Petitioners presented a motion to Judge Decker requesting, inter-alia, that the Memorandum Opinion and Order of March 15, 1978 be reconsidered and vacated. That motion was denied on March 21, 1978. On March 22, 1978 Petitioners filed their Notice of Appeal whereby the March 15, 1978 Order was appealed to the United States Court of Appeals for the Seventh Circuit.

Subsequently, the issue on appeal was fully briefed by the respective parties.

On August 10, 1978, the United States Court of Appeals for the Seventh Circuit entered an Order requiring simultaneous memoranda from the respective parties as to the jurisdiction of that Court to entertain the appeal from the subject Order of the District Court staying proceedings pending arbitration.

The Petitioners filed their Memorandum which clearly and unequivocally asserted that jurisdiction was proper in the United States Court of Appeals for the Seventh Circuit with respect to the subject appeal. The grounds asserted by the Petitioners are detailed hereinbelow.

28 U.S.C. 1292(a)(1) provides in pertinent part that the Court of Appeals shall have jurisdiction of appeals from:

> "Interlocutory order of the District Courts of the United States...granting, continuing, modifying, refusing, or dissolving injunctions or refusing to dissolve or modify injunctions..."

An order granting or denying a stay of proceedings in a District Court pending arbitration has been held to be tantamount to the granting or denial of an injunction and is, therefore, appealable under Sec. 1292(a)(1) if the

following two-prong test is satisfied:

1. The action in which the order was made is an action which before the fusion of law and equity was by its nature an action at law.

2. The stay was sought to permit the prior determination of some equitable defense.

Enelow v. New York Life Insurance Company, 293 U.S.397 (1934); Ettelson v. Metropolitan Life Insurance Company, 317 U.S. 188 (1942); Shanferoke Co. v. Westchester, 293 U.S. 449 (1942); Baltimore Contractors Inc. v. Bodinger, 348 U.S. 176 (1955); Travel Consultants v. Travel Management Corporation, 367 F.2d 334 (D.C.Cir. 1966); Standard Chlorine of Delaware v. Leonard, 384 F.2d 304 (2d Cir. 1967); American Safety Equipment v. J.P. McGuire Company Inc., 391 F.2d 821 (2d Cir. 1968); Power Replacement Inc. v.

Air Preheater Company Inc., 426 F.2d 980 (9th Cir. 1970); Wallace v. Norman Industries, 467 F.2d 824 (5th Cir. 1972); J.S.& H. Construction Company v. Richmond County Hospital Authority, 473 F.2d 212 (5th Cir. 1973); Zell v. Jacoby-Bender Inc., 542 F.2d 34 (7th Cir. 1976).

In American Safety Equipment, a declaratory judgment action was brought by a licensee against a licensor to declare that the license agreement was illegal and void ab initio and that no royalty obligation had or would accrue under the license agreement. The licensor demanded a stay to submit the dispute to arbitration pursuant to the arbitration clause of the written license agreement and the District Court stayed the declaratory judgment action pending arbitration. American Safety Equipment is drastically similar

to the case before this Court with respect to the factual background, nature of the proceeding, and the issue upon appeal. Therefore, this Court's patience and indulgence is requested in connection with the presentation below of a lengthy quote.

The Court stated the following in American Safety Equipment at page 824:

> "The basic question we must resolve is whether the district court erred in staying ASE's actions and ordering arbitration of ASE's antitrust allegations. Before reaching it, however, we must determine whether these orders are properly before us at all, i.e., whether they are appealable. That issue was not initially noticed by the parties; we brought it to their attention, however, and they subsequently submitted briefs on the matter. A very recent case in this circuit, Standard Chlorine, Inc. v. Leonard, 384 F.2d 304 (2d Cir. 1967), is dispositive of the law to be applied. As we stated there, adopting the Fifth Circuit's formulation, id. at 308:

> 'An order staying or refusing to stay proceedings in the District Court is appealable under § 1292(a)(1) only if (A) the action in which the order was made is an action which, before the fusion of law and equity, was by its nature an action at law; and (B) the stay was sought to permit the prior determination of some equitable defense or counterclaim.'

"The second requirement has clearly been met here; setting up the arbitration agreement is itself an equitable defense. Id.; see Shanferoke Coal & Supply Corp. of Delaware v. Westchester Service Corp., 293 U.S. 449, 452, 55 S.Ct. 313, 79 L.Ed. 583 (1935).

"Whether the first requirement has been fulfilled is more complicated. A declaratory judgment action is a statutory creation, and by its nature is neither fish nor fowl, neither legal nor equitable. Where, as here, such an action has required classification, the courts have looked to the basic nature of the suit in which the issues involved would have arisen if Congress had not created the Declaratory Judgment Act, 28 U.S.C.§§ 2201, 2202, E.g., Simler v. Conner, 372 U.S. 221, 83 S. Ct. 609, 9 L.Ed. 2d 691 (1963); Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 504,

> 515, 79 S.Ct. 948, 3 L.Ed. 2d 988 (1959); see Wright, Federal Courts § 100, at 392-93 (1963). Were it not for the availability of declaratory relief, the dispute between ASE and Hickok would normally arise in one of two ways. ASE could bring an action for treble damages based upon the alleged antitrust violations. On the other hand, ASE could wait until Hickok attempted to collect outstanding royalties and then assert the illegality of the agreement as a defense.
>
> "In either instance, the action would be legal, not equitable. See Beacon Theatres, Inc. v. Westover, supra; Ring v. Spina, 166 F.2d 546 (2d Cir.), cert. denied, 335 U.S. 813, 69 S.Ct. 30, 93 L.Ed. 368 (1948). Since the basic nature of ASE's declaratory judgment action against Hickok is thus legal, the conditions set forth in Standard Chlorine are met, and the appeal will lie."

The United States Court of Appeals for the Ninth Circuit held in the case of Hudson Lumber Company v. United States Plywood Corporation, 181 F.2d 929 (9th Cir. 1950) that an order staying a declaratory judgment proceeding pending arbitration under a certain

provision of a written agreement between the respective parties was appealable under Sec. 1292(a)(1) pursuant to Enelow, supra; Shanferoke, supra; and other cases. The court analyzed the plaintiff's Complaint for Declaratory Judgment and concluded that such Complaint did not include any facts warranting injunctive relief and that the plaintiff, in fact, did not seek injunctive or equitable relief to prevent irreparable injury. As such, the court concluded that the plaintiff's action was not equitable and, therefore, must be of legal character.

The plaintiff sued for damages and equitable relief in Cuneo Press v. Kokomo Paper Handler's Union, 235 F.2d 108 (7th Cir. 1956) and the defendant responded by demanding a stay of the proceedings pending arbitration pursuant to a provision of the written agreement

between the parties. The District Court denied the defendant's motion and an appeal followed. The plaintiff moved to dismiss the appeal on the ground that the stay order was not final or appealable under the authority of Baltimore Contractors, supra. The Court of Appeals for the Seventh Circuit rejected the plaintiff's motion and held under the authority of Shanferoke, supra, and Enelow, supra that a motion for stay was an application for an interlocutory injunction based upon the motion setting up the special defense of the duty to arbitrate. The appeal was held proper under Sec. 1292(a)(1).

In Zell, supra, the plaintiff, a sales representative, sued the defendant, a manufacturer, for an accounting. Defendant moved for a stay of the proceeding pending arbitration under the terms of an agreement between the

parties, and the District Court did stay the proceeding pending arbitration. The defendant argued before the Appellate Court that the appeal was not proper since the plaintiff's accounting suit was equitable in character. However, the Appellate Court analyzed the requirements for an action for an accounting and reviewed the record to see if it disclosed the presence of these requirements. The court concluded that the necessary allegations for the equitable action for an accounting were not present in the record and that, therefore, the plaintiff's action was, in actuality, for breach of contract and money damages. Such action was held to be at law. The plaintiff's appeal was then held to be proper under Sec. 1292(a)(1) and Baltimore Contractors, supra.

It is well established that the interposition of an arbitration agreement to avoid litigation is the establishment of an equitable defense for the purpose of satisfying the second part of the applicable two-pronged test. American Safety Equipment Corp., supra; J. S. & H. Construction Co., supra; Danford v. Schwabacher, 488 F. 2d 454 (9th Cir. 1973).

A declaratory judgment action is a statutory creation and is neither "fish nor fowl, neither legal or equitable". Therefore, we must look to the "basic nature of the suit" in which the issues involved would have arisen if Congress had not created the Declaratory Judgment Act. American Safety Equipment Corp., supra.

The Petitioners' Complaint herein is devoid of any allegations regarding injunctive or equitable claims and does

not request any injunctive or equitable relief. The issue between the respective parties is, in reality, one of royalties and moneys and the suit as presently framed is not equitable in character. In the absence of a declaratory judgment action, the Respondent would probably have sued the Petitioners for such royalties and moneys and the Petitioners would have interposed the matters recited in the Complaint for Declaratory Judgment as defenses. Without the availability of a declaratory judgment action, the action between the respective parties hereto could have been maintained only at law.

On September 7, 1978, an order was entered in the United States Court of Appeals for the Seventh Circuit whereby the appeal of Judge Decker's order was dismissed. Said order provided in

pertinent part as follows:

> "IT IS ORDERED that this appeal is hereby DISMISSED because it is not taken from a final order. Baltimore Contractors, Inc. v. Bodinger, 348 U.S. 176 (1955); Zell v. Jacoby-Bender, Inc., 542 F. 2d 34 (7th Cir. 1976)."

The September 7, 1978 Order of the United States Court of Appeals for the Seventh Circuit is in conflict with the Enelow-Ettelson Rule and several other decisions of the United States Supreme Court and many decisions from the Second, Fifth, Seventh, and Ninth Circuit Courts of Appeal. This will be discussed in detail hereinbelow.

The Enelow-Ettelson Rule and the cases decided thereunder have held that an appeal from an order staying the proceeding pending arbitration is deemed to be pursuant to 28 U.S.C. Sec. 1292(a)(1). In addition, the Petitioners pursued said appeal under

Sec. 1292(a)(1) and never argued or asserted that the said appeal is from a final order pursuant to 28 U.S.C. Sec. 1291.

Further, the Appellate Court incorrectly relied upon Baltimore Contractors, Inc., supra and Zell, supra for authority in its decision. The Supreme Court of the United States in Baltimore Contractors, Inc., supra, held that the denial of a stay order pending arbitration in an equitable action for an accounting was not appealable since the action was not at law. However, Baltimore Contractors, supra, endorsed the Enelow-Ettelson Rule whereby a stay order pending arbitration in an action at law is appealable. The Appellate Court's reliance on Zell, supra, is also mistaken and without basis. The Court of Appeals for the Seventh Circuit in Zell, supra, dissected the

plaintiff's cause of action and ascertained that such action was in reality an action cognizable at law for breach of contract in spite of the action being styled for accounting. Therefore, the plaintiff's action was deemed to be at law for damages and appealable as an interlocutory injunction under 28 U.S.C. Sec. 1292(a)(1) and the Enelow-Ettelson Rule.

After the September 7, 1978 ruling, the Petitioners filed a Petition for a Rehearing en banc in an attempt to demonstrate the Appellate Court's misapprehension and misapplication of the applicable statutes and court decisions. The Petitioners, in detail, explained that the appeal was pursuant to Section 1291(a)(1) and conformed to the requirements established by the Enelow-Ettelson Rule. The Petitioners also pointed out to the Court that the

Court's reliance on Baltimore Contractors, Inc., supra, and Zell, supra, was in error. The Motion for Rehearing en banc was denied on October 17, 1978.

REASONS FOR GRANTING CERTIORARI

The September 7, 1978 Order herein of the United States Court of Appeals for the Seventh Circuit is in direct conflict with the decisions of the United States Supreme Court and:

1. Enelow v. New York Life Insurance Company, 293 U.S. 397 (1934)
2. Ettelson v. Metropolitan Life Insurance Company, 317 U.S. 188 (1942)
3. Shanferoke Co. v. Westchester, 293 U. S. 449 (1942)
4. Baltimore Contractors Inc. v. Bodinger, 348 U.S. 176 (1955)

These cases established that an order granting or denying the stay of a proceeding in a district court pending arbitration is tantamount to the granting or denial of an injunction and is,

therefore, appealable under Sec. 1292 (a)(1) if the action in which the order was made is an action which before the fusion of law and equity warranted by its nature an action at law and the stay was sought to permit the prior determination of some equitable defense. The rule established by these cases is commonly known as the Enelow-Ettelson Rule and has been in effect for a long period of time and respected by the United States Supreme Court and the United States Court of Appeals. The Supreme Court stated the following in Baltimore Contractors, supra, at page 184:

> "The incongruity of taking jurisdiction from a stay in a law-type and denying jurisdiction in an equity-type proceeding springs from the persistence of outmoded procedural differentiations... The distinction has been applied for years, however, and we conclude that it is better judicial practice to follow the precedence which limit appealability of interlocutory orders, leaving Congress to make such amendments as it may find proper."

The Supreme Court of the United States in the exercise of its supervisory power over lower federal courts must resolve conflicts of opinions of federal questions that have arisen among lower courts. The Supreme Court of the United States has the responsibility to bring about uniformity of decisions on those matters among the federal courts of appeal that may be a source of controversy and confusion. This is especially true where the difference between the respective courts of appeal involves federal practice and procedure. It is respectfully submitted that the subject Order of September 7, 1978 is in direct conflict with the following decisions:

1. Travel Consultants v. Travel Management Corporation, 367 F.2d 334 (D.C. Cir. 1966)

2. Standard Chlorine of Delaware v. Leonard, 384 F.2d 304 (2d Cir. 1967)

3. American Safety Equipment v. J. P. McGuire Company Inc., 391 F.2d 821 (2d Cir. 1968)

4. Power Replacement Inc. v. Air Preheater Company Inc., 426 F.2d 980 (9th Cir. 1970)

5. Wallace v. Norman Industries, 467 F.2d 824 (5th Cir. 1972)

6. J. S. & H. Construction Company v. Richmond County Hospital Authority, 473 F.2d 212 (5th Cir. 1973)

7. Zell v. Jacoby-Bender Inc., 542 F.2d 34 (7th Cir. 1976)

8. Hudson Lumber Co. v. United States Plywood Corporation, 181 F.2d 929 (9th Cir. 1950)

9. Weissbuch v. Merrill, Lynch, Pierce, Fenner & Smith, Inc., 558 F.2d 831 (7th Cir. 1977)

10. Cuneo Press v. Kokomo Paper Handler's Union, 235 F.2d 108 (7th Cir. 1956)

11. Danford v. Schwabacher, 488 F.2d 454 (9th Cir. 1973)

Therefore, the subject Order contradicts and is in conflict with decisions rendered by the Second, Fifth, Seventh, and Ninth United States Court of Appeals.

Each of the above eleven decisions endorsed and followed the Enelow-Ettelson Rule. In particular, American Safety Equipment, supra, decided by the Second Circuit and Hudson Lumber Company, supra, decided by the Ninth Circuit held that the Enelow-Ettelson Rule is applicable to declaratory judgment actions and the Appellate Court in reviewing whether or not an order is appealable must determine whether the action would have been maintained at law or in equity prior to the merger of law and equity and in the absence of the availability of the declaratory judgment action. In American Safety Equipment, supra, and in Hudson Lumber Company, supra, the District Court stayed the declara-

tory judgment action pending arbitration under the written agreement and an appeal from such order was held proper since the plaintiff's Complaint did not include facts warranting injunctive relief or equitable relief to prevent irreparable injury. In American Safety Equipment, supra, the Court specifically noted that if the declaratory judgment action was not available, the plaintiff would probably have waited for the defendant to sue for money damages and then assert the allegations contained in the Complaint for Declaratory Judgment as defenses to such an action.

It is important that the courts of appeal for the different circuits adhere and respect the law as established by the Supreme Court of the United States. The law with respect to the subject issue was established

by the Supreme Court of the United States in the Enelow, supra; Ettelson, supra; Shanferoke Company, supra; and Baltimore Contractors, supra. The Second, Fifth, Ninth, and even the Seventh Circuits have adhered to the Enelow-Ettelson Rule and rendered decisions in conformity with that Rule. However, the Seventh Circuit in this case elected to disregard the Enelow-Ettelson Rule established by the Supreme Court and the decisions of the above-mentioned Courts of Appeal. This has resulted in the denial of the Petitioners' right to appeal an Order of the District Court to the Court of Appeals. This right is of an important and fundamental character and should be respected and preserved. The Court of Appeals for the Seventh Circuit had the obligation to follow the precedent established by the Supreme Court of

the United States and the Courts of Appeal.

CONCLUSION

The decision of the Court of Appeals for the Seventh Circuit is contrary to the dictates of the Supreme Court of the United States and numerous decisions of Appellate Courts throughout the country. Therefore, a Writ of Certiorari is necessary and appropriate so as to resolve conflicts of opinion on a federal question pertaining to practice and procedure and so as to avoid and eliminate a source of controversy and confusion. The right to appeal a District Court decision to a

Court of Appeal is a most important and fundamental right and should be available throughout the country on a uniform basis.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

WESLEY-JESSEN, INC., etc., et al.,	)	
Plaintiffs,	)	
-vs-	)	NO. 76C3012
MARCELO CHIQUIAR ARIAS,	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

This diversity action seeks a declaratory judgment as to the defendant's right to royalties in connection with certain disclosures made to the plaintiffs. The complaint alleges that the rights and obligations of the parties are governed by a contract dated March 24, 1960, which is attached to the complaint.

According to the allegations of the complaint, the defendant, a resident of Mexico, entered into an agreement with the plaintiffs, residents of Illinois,

whereby the defendant agreed to convey his knowledge and information regarding the design and manufacture of contact lenses and to permit the plaintiffs to make use of this information in their business in developing and manufacturing contact lenses. The plaintiffs allege that the defendant is now making a claim for royalties generated by use of the information provided pursuant to this contract. The plaintiffs seek a declaratory judgment that the defendant is not entitled to any monies, patents, or products of the plaintiffs.

This case is now before the court on the defendant's motion to stay the proceedings pending the outcome of arbitration as provided in paragraph 12

of the contract:

> "12. In the event a dispute shall arise between the shareholders or the directors which is not capable of being resolved under the provisions of this agreement then before any party shall have the right to submit the matters involved to litigation in the courts of law, the matter shall be submitted to the American Arbitration Association and settled in accordance with the rules of the Association."

The plaintiffs object to the defendant's motion on two grounds. First, they contend that paragraph 12 does not apply because this case is "capable of being resolved under the provisions of this agreement." However, to make sense, this paragraph must be read to include the words "by the parties"; any other interpretation--e.g., that the parties could go to court for resolution only if the court did not consider any matter outside the express terms of the agreement--would be meaningless.

Read this way, then, paragraph 12 applies to any dispute not capable of being resolved by the parties under the provisions of the agreement. This case clearly falls within that description.

The plaintiffs' second argument against application of paragraph 12 is that the arbitration agreement is void because in 1960, the date of the contract, Illinois courts refused to order specific performance of such agreements, Cocalis v. Nazlides, 308 Ill. 152 (1923). However, the relevant Illinois statute was amended in 1961,[1] and present law clearly provides that arbitration clauses are enforceable;

> "§10. Validity of arbitration agreement

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1 The statute was amended again in 1976, adding provisions not relevant here.

> "A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable save upon such grounds as exist for the revocation of any contract, . ." Ill. Rev. Stat. ch. 10 §101.

The Cocalis court noted that at common law, a party could sue for enforcement of an arbitration award, but that courts would not order specific performance of a promise to arbitrate. The reason for this rule was that arbitration was viewed as an attempt to oust the courts, and to deny parties the right to resort to the courts for a final resolution. However, the fact that awards were enforced demonstrates that arbitration was not considered absolutely against public policy. Rather, the rule was simply that arbitration agreements could not be enforced by specific performance, and this was

changed by §101, as quoted above. The parties' intention in including paragraph 12 is clear; this agreement is enforceable.

Although this case was originally filed in August of 1976, much of the intervening time was consumed by extended briefing schedules for a motion to quash service and for this motion. The parties have apparently been unable to work out a resolution to their dispute despite on-going negotiations. According to the contract, the dispute should now be submitted to arbitration. Accordingly, the defendant's motion to stay the proceedings is hereby granted. The proceedings will be stayed pending the outcome of arbitration as provided by paragraph 12 of the contract.

ENTER:

United States District Judge

DATED: March 15, 1978.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604
Submitted: September 6, 1978

September 7, 1978

Before

Hon. WALTER J. CUMMINGS, CIRCUIT JUDGE

Hon. WILBUR F. PELL, JR., CIRCUIT JUDGE

Hon. WILLIAM J. BAUER, CIRCUIT JUDGE

WESLEY-JESSEN INC., an Illinois corporation and DOCTOR NEWTON T. WESLEY, Plaintiffs-Appellants, vs. MARCELO CHIQUIAR ARIAS, Defendant-Appellee.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 76-C-3012 BERNARD M. DECKER, JUDGE.
No. 78-1465	

This court has, sua sponte, thoroughly reviewed the briefs and supplemental memorandum filed herein by the parties for this appeal. On consideration thereof,

IT IS ORDERED that this appeal is hereby DISMISSED because it is not taken from a final order. Baltimore Contractors, Inc. v. Bodinger, 348 U.S. 176 (1955); Zell v. Jacoby-Bender, Inc., 542 F. 2d 34 (7th Civ. 1976).

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

October 17, 1978

Before

Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. WILLIAM J. BAUER, Circuit Judge

WESLEY-JESSEN INC., an Illinois corporation, and DR. NEWTON K. WESLEY, Plaintiffs-Appellants,	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 78-1465 vs.	No. 76-C-3012
MARCELO CHIQUIAR ARIAS, Defendant-Appellee.	Bernard M. Decker, Judge.

O R D E R

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled cause by plaintiffs-appellants, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

1 Ill. Rev. Stat. 1959, ch. 10, §1, page 194. (Arbitration and Awards)

[1. Submission of controversy to arbitrators.]
§ 1. Be it enacted by the People of the State of Illinois, represented in the General Assembly: That all persons having requisite legal capacity may, by an instrument in writing to be signed by them, submit to one or more arbitrators to be named in the manner indicated by such writing, any controversy existing between them, and may, in such submission, agree that any court of competent jurisdiction, or any court therein named (provided it is of competent jurisdiction) may pass upon any questions of law arising in such arbitration proceedings, and that a judgment, or succesive judgments, of such court shall be rendered upon the award made pursuant to such submission, and for payment of fees and costs of the arbitrator or arbitrators. [As amended by act approved June 28, 1919. In force July 1, L. 1919, p. 216.]

1 Ill. Rev. Stat., 1977, ch. 10, §101, page 189. (Uniform Arbitration Act)

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101. §1. Validity of arbitration agreement. A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable save upon such grounds as exist for the revocation of any contract, except that any agreement between a patient and a hospital or health care provider to submit to binding arbitration a claim for damages arising out of (1) injuries alleged to have been received by a patient, or (2) death of a patient due to hospital or health care provider negligence or other wrongful act, but not including intentional torts, is also subject to the Health Care Arbitration Act.

1 Ill. Rev. Stat. 1977, ch. 10, §119, page 191. (Uniform Arbitration Act)

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119. §19. (Act not retroactive.) This Act applies only to agreements made subsequent to the effective date of this Act.

8 U.S.C. 1976 ed., Title 28, §1291, page 159. (Jurisdiction and Venue)

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§ 1291. Final decisions of district courts

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

8 U.S.C. 1976 ed., Title 28, §1292(a)(1), page 160. (Jurisdiction and Venue)

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§ 1292. Interlocutory decisions

(a) The courts of appeals shall have jurisdiction of appeals from: (1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court.